

§ 351.10 Evidence.

(a) *Admissibility.* All evidence that is relevant and not unduly repetitious or privileged, shall be admissible. Written testimony and exhibits will be received into the record, except where the Board sustains an objection. No evidence, including exhibits, may be submitted without a sponsoring witness, except matters of which the Board may take official notice.

(b) *Examination of witnesses.* All witnesses shall be required to take an oath or affirmation before testifying. Parties are entitled to conduct direct examination (consisting of the testimony of the witness in the written direct statement and an oral summary of that testimony); cross-examination (limited to matters raised on direct examination); and redirect examination (limited to matters raised on cross-examination). The Board may limit the number of witnesses or limit questioning to avoid cumulative testimony.

(c) *Documentary evidence.* (1) *Submission as exhibits.* Evidence that is submitted in the form of documents or detailed data and information shall be presented as exhibits.

(2) *Separation of irrelevant portions.* Relevant and material matter embraced in a document containing other matter not material or relevant or not intended as evidence must be plainly designated as the matter offered in evidence, and the immaterial or irrelevant parts shall be marked clearly so as to show they are not intended as evidence.

(3) *Bulky exhibits.* In cases where a document in which material and relevant matter occurs is of such bulk that it would unnecessarily encumber the record, it may be marked for identification and the relevant and material parts, once properly authenticated, may be read into the record. In such instances, a true copy of the material and relevant matter may be presented in extract form, and submitted as evidence.

(d) *Copies.* Anyone presenting documents as evidence must present copies to all other participants in the proceedings, or their attorneys, and afford them an opportunity to examine the documents in their entirety and offer into evidence any other portion that

may be considered material and relevant. However, if a publicly available document issued by a governmental entity (such as an official report, decision, opinion, or published scientific or economic data) is offered in evidence, it may be offered instead by identifying the document and signaling the relevant parts.

(e) *Introduction of studies and analyses.* If studies or analyses are offered in evidence, they shall state clearly the study plan, all relevant assumptions, the techniques of data collection, and the techniques of estimation and testing. The facts and judgments upon which conclusions are based shall be stated clearly, together with any alternative courses of action considered. If requested, tabulations of input data shall be made available to the Board.

(1) *Statistical studies.* Statistical studies offered in evidence shall be accompanied by a summary of their assumptions, their study plans, and their procedures. Supplementary details shall be included in appendices. For each of the following types of statistical studies the following should be furnished:

(i) *Sample surveys.*

(A) A clear description of the survey design, the definition of the universe under consideration, the sampling frame and units, the validity and confidence limits on major estimates; and

(B) An explanation of the method of selecting the sample and of the characteristics which were measured and counted.

(ii) *Econometric investigations.*

(A) A complete description of the econometric model, the reasons for each assumption, and the reasons for the statistical specification;

(B) A clear statement of how any changes in the assumptions might affect the final result; and

(C) Any available alternative studies that employ alternative models and variables, if requested.

(iii) *Experimental analysis.*

(A) A complete description of the design, the controlled conditions, and the implementation of controls; and

(B) A complete description of the methods of observation and adjustment of observation.

(iv) *Studies involving statistical methodology.*

(A) The formula used for statistical estimates;

(B) The standard error for each component;

(C) The test statistics, the description of how the tests were conducted, related computations, computer programs, and all final results; and

(D) Summarized descriptions of input data and, if requested, the input data themselves.

(f) *Objections; offers of proof.* Parties are entitled to raise objections to evidence on any proper ground during the course of the hearing, including an objection that an opposing party has not furnished unprivileged underlying documents. If the Board rejects or excludes testimony, the participant proffering the testimony may submit an offer of proof for the record. In the case of documentary or written evidence, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(g) *New documents for use in cross-examination.* Documents that have not been identified and exchanged in advance may be shown to a witness on cross-examination. However, copies of such documents must be distributed to the Board and to the other participants before being shown to the witness at the time of cross-examination, unless the Board directs otherwise. If the document is not, or will not be, supported by a witness for the cross-examining party, that document can be used solely to impeach the witness's direct testimony.

§ 351.11 Rebuttal proceedings.

Written rebuttal statements shall be filed at a time designated by the Copyright Royalty Board upon conclusion of the hearing of the direct case, in the same form and manner as the written direct statement, except that the claim or the requested rate shall not have to be included if it has not changed from the written direct statement. Further proceedings at the rebuttal stage shall follow the schedule ordered by the Board.

§ 351.12 Requests for additional discovery during the hearing in rate proceedings.

(a) A participant may, in the course of a royalty rate hearing, request of an opposing participant or witness other relevant information. The request may be made by means of written motion or oral motion on the record. The Copyright Royalty Board will allow such request only if they determine that, absent the discovery sought, their ability to achieve a just resolution of the proceeding would be substantially impaired.

(b) In determining whether discovery will be granted under this section, the Copyright Royalty Board will consider—

(1) Whether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues;

(2) Whether the requested information or materials would be unreasonably cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome, or less expensive; and

(3) Whether the participant seeking the discovery had an ample opportunity by previous discovery in the proceeding or by other means to obtain the information sought.

(c) This section shall not apply to any proceeding scheduled to commence after December 31, 2010.

§ 351.13 Closing the record.

To close the record of a hearing, the Chief Judge shall make an announcement that the taking of testimony has concluded. In its discretion the Copyright Royalty Board may close the record as of a future specified date, and all time for exhibits yet to be prepared to be admitted, provided that the parties to the proceeding stipulate on the record that they waive the opportunity to cross-examine or present evidence with respect to such exhibits. The record in any hearing that has recessed may not be closed by the Chief Judge before the day on which the hearing is